

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SRIRAM KRISHNAN,

Plaintiff,

v.

CAMBIA HEALTH SOLUTIONS INC et
al.,

Defendant.

CASE NO. 2:20-cv-00574-TL

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS AS A
SANCTION AND STRIKING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This matter is before the Court on Defendants' Motion to Dismiss as a Discovery Sanction. Dkt. No. 44. Also pending before the Court is Defendants' Motion for Summary Judgment. Dkt. No. 46. The Court has reviewed the briefing, relevant records, and applicable law and finds that oral argument is unnecessary. For the reasons stated herein, the Court DENIES Defendants' motion to dismiss as a discovery sanction but will allow Defendants additional time to complete discovery to cure the prejudicial impact of Plaintiff's discovery violations. The Court also STRIKES Defendants' currently pending motion for summary judgment and will reset

1 the dispositive motion deadline to allow Defendants to incorporate any newly discovered
2 evidence into a renewed dispositive motion.

3 I. BACKGROUND

4 On April 15, 2020, Plaintiff Sriram Krishnan filed suit alleging retaliatory termination
5 against Defendants Cambia Health Solutions, Inc., and Regence BCBS of Oregon (collectively
6 “Defendants”). Dkt. No. 1-1. On January 28, 2021, at the Parties’ request, the Court entered an
7 amended schedule requiring discovery to be completed by June 14 and resetting the dispositive
8 motion deadline to July 14, 2021. Dkt. No. 27. On May 27, 2021—just over two weeks before
9 the new discovery cutoff—Defendants moved to compel production of Plaintiff’s electronic
10 devices for forensic examination.¹ Dkt. No. 31.

11 After Defendants filed their motion to compel, Plaintiff disclosed the existence of a cell
12 phone containing communications that were responsive to the requests Defendants raised in their
13 discovery motion. Dkt. No. 44 at 3. On June 4—only 10 days before the end of the discovery
14 period—Plaintiff produced a relatively large number of responsive documents from the belatedly
15 disclosed cell phone. Dkt. No. 38 at 2-3 (noting that Plaintiff produced only “360 total pages of
16 documents” prior to Defendants filing the motion to compel, but then produced 1,600 pages of
17 additional documents on June 4). In their reply briefing, Defendants argued the surprise
18 disclosure and production of responsive documents so close to the discovery cutoff and
19 dispositive motions deadlines evidenced bad faith and requested discovery sanctions in the form
20 of motion-related costs and fees. Dkt. No. 38 at 7.

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24 ¹ On the same day, Plaintiff also filed a motion to compel discovery. Dkt. No. 33.

1 To meet the July 14 dispositive motions deadline, Defendants filed the instant motion to
 2 dismiss as a sanction and a separate motion for summary judgment while the discovery motions
 3 were still pending. Dkt. Nos. 44, 46.

4 On July 23, the Court entered its Order granting Defendants' motion to compel forensic
 5 examination of all of Plaintiff's electronic devices.² Dkt. No. 49 at 8-10. Specifically, the Court
 6 found that

7 Plaintiff's delay in producing requested documents and communications and failure
 8 to disclose the existence of a second cell phone used for such communications
 9 raises significant concerns about Plaintiff's efforts to comply with discovery
 10 obligations in good faith. It appears that Plaintiff may have intentionally withheld
 11 relevant and discoverable communications from Defendants and, possibly, from his
 12 own counsel.

13 *Id.* at 9. Despite this finding, the Court refused to consider Defendants' request for monetary
 14 sanctions because it was raised for the first time in their reply briefing. *Id.* at 10, n.1.

15 II. DISCUSSION

16 The Federal Rules of Civil Procedure empower the Court to impose sanctions if a party
 17 fails to respond to a properly served discovery request. Fed. R. Civ. Proc. 37(d)(3). Rule 37
 18 clarifies that an evasive or incomplete disclosure or response is to be treated as a failure to
 19 respond. *Id.* at 37(a)(4). The Court is authorized to impose sanctions up to and including
 20 dismissal. *Id.* at 37(d)(3), (b)(2)(A)(i)-(vi); *see also Yeti by Molly, Ltd. v. Deckers Outdoor*
 21 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (giving "particularly wide latitude to the district
 22 court's discretion to issue sanctions" under Rule 37).

23 ² The Court also denied in substantial part Plaintiff's competing motion to compel, ordering Defendants to produce
 24 only a single email communication that they incorrectly withheld as privileged. *See* Dkt. No. 49 at 2-8. The Court
 also denied two other discovery-related motions filed by the Plaintiff: (1) a motion for leave to file an untimely
 discovery motion (Dkt. No. 39), and (2) a motion to extend the discovery period (Dkt. No. 40). *See* Dkt. No. 49
 at 10-11. The Court also rejected Plaintiff's request to impose the cost of the forensic examination on Defendants
 "[b]ecause the requirement for a forensic examination is the direct consequence of Plaintiff's failure to properly
 disclose communications and apparent withholding of information." *Id.* at 10.

1 “District courts have substantial discretion to impose the extreme sanction of dismissal
2 where there has been flagrant, bad faith disregard of discovery duties.” *Canty v. City of Seattle*,
3 2018 WL 3722336, at *3 (W.D. Wash. Feb. 28, 2018) (citing *Nat’l Hockey League v. Metro.*
4 *Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)), *report and recommendation adopted*, 2018 WL
5 3708052 (W.D. Wash. Aug. 3, 2018). The Ninth Circuit has adopted a five-factor test to guide
6 district courts when determining whether a party’s “willfulness, bad faith, and fault” justify
7 dismissal. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091,
8 1096 (9th Cir. 2007) (internal quotations omitted) (hereinafter “*Connecticut General*”). The five
9 factors to be considered are “(1) the public's interest in expeditious resolution of litigation;
10 (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions;
11 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
12 drastic sanctions.” *Id.* (internal quotations and citations omitted). These factors are “not a set of
13 conditions precedent for sanctions” but simply provide “the district court with a way to think
14 about what to do” in a particular case. *Id.*

15 **A. Dismissal as a Discovery Sanction is Not Warranted**

16 Both sides argue that all five factors weigh in their respective favors. Defendants rely
17 heavily on their argument that the nature and timing of Plaintiff’s belated disclosure of a second
18 cell phone shows bad faith and willfulness. *See generally* Dkt. Nos. 44, 55. Plaintiff appears to
19 argue that his voluntary disclosure and expedited supplemental production renders Defendants’
20 complaints harmless, and his subsequent compliance with the Court’s order regarding forensic
21 examination of his devices shows that the extreme sanction of dismissal is unwarranted. *See*
22 *generally* Dkt. No. 50. The Court finds that, while Plaintiff clearly failed to meet his discovery
23 obligations, on balance, his actions do not warrant dismissal.

1 **1. The First, Second, and Fourth Factors: Expeditious Resolution,**
 2 **Docket Management, and Disposition on the Merits**

3 On the one hand, the Court agrees with Defendants that the first two factors likely weigh
 4 in their favor, but only marginally. Far from curing these issues, Plaintiff’s voluntary disclosure
 5 and production of documents *after* Defendants already filed their motion to compel directly
 6 hindered the expeditious resolution of this action and unnecessarily multiplied the docket activity
 7 in this case. At the very least, Plaintiff’s delayed disclosure has now spawned multiple otherwise
 8 unnecessary discovery motions, hampered Defendants’ ability to pursue relevant additional
 9 discovery, and will necessitate yet another amendment to the case schedule.

10 On the other hand, even though the Court is very concerned “that Plaintiff may have
 11 intentionally withheld relevant and discoverable communications from Defendants and, possibly,
 12 from his own counsel” (Dkt. No. 49 at 9), the fourth factor “always weighs against dismissal.”
 13 *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 788 (9th Cir. 2011). These three factors essentially
 14 cancel out, so it is the third and fifth factors that are most relevant to the Court’s determination
 15 here. *See Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990).

16 **2. The Third Factor: Risk of Prejudice to Defendants**

17 This factor weighs strongly in Defendants’ favor. Plaintiff waited until June 4, 2021—
 18 less than two weeks before the end of the discovery period—to produce 1600 pages of
 19 responsive communications that were originally requested in August 2020 and February 2021.
 20 Dkt. No. 44 at 2-3. Plaintiff’s disclosure of the second cell phone came only *after* Defendants
 21 moved to compel a forensic review of his devices that might have uncovered the existence of the
 22 previously undisclosed device anyway. *Id.* The delayed supplemental production dwarfed the
 23 360 total pages Plaintiff had previously produced to that point. Dkt. No. 38 at 2-3. This means
 24 that Plaintiff’s actions deprived Defendants of a significant majority of the documentary

1 evidence they had a right to when considering and preparing for discovery, including
2 depositions. In fact, Defendants have identified specific additional written discovery they would
3 have pursued and adjustments to their deposition strategy they would have made had they
4 received the belated supplemental production in a timely fashion. Dkt. No. 55 at 3-4.

5 Plaintiff first counters that Defendants were not actually prejudiced because Plaintiff
6 voluntarily produced the documents prior to the discovery and dispositive motions deadlines.
7 This argument completely misses the point. *See* Dkt. No. 50 at 5. Rule 37 makes clear that an
8 “evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose,
9 answer, or respond.” Fed. R. Civ. Proc. 37(a)(4). The documents produced from the second cell
10 phone were in Plaintiff’s possession and control when Defendants served their initial discovery
11 requests. As previously noted by the Court, Plaintiff’s actions raise “significant concerns about
12 Plaintiff’s efforts to comply with discovery obligations in good faith.” Dkt. No. 49 at 9. Even if
13 unintentional, Plaintiff’s failure to disclose the cell phone in a timely manner resulted in evasive
14 and incomplete responses to Defendants’ valid discovery requests, which the Court must treat as
15 a failure to respond. Plaintiff’s untimely disclosure does not eliminate the prejudice to
16 Defendants’ discovery efforts that stems from the original failure to respond. And the fact that
17 Defendants were able to meet the dispositive motion deadline does not cure the prejudice that
18 originates from the potentially deficient evidentiary record they were then forced to rely on due
19 to Plaintiff’s failure to meet his discovery obligations.

20 Plaintiff’s second argument on this factor is even less compelling and only reinforces
21 Defendants’ allegation of bad faith. In the opposition brief and supporting declaration, Plaintiff’s
22 counsel claims that she suggested extending the discovery cutoff prior to Defendants’ motion to
23 compel to provide “Defendants with additional time to review Plaintiff’s document production.”
24 Dkt. No. 50 at 5, Dkt. No. 51 at ¶¶ 11-13. The Court takes several issues with this representation.

1 Plaintiff's counsel requested that Defendants stipulate to an expansion of the discovery
2 period in an email that was sent at 4:13 PM on the same day the Parties were required to file
3 discovery motions per the Court's scheduling order. *See* Dkt. No. 51-1 at 69. The email focused
4 only on allegations of deficiencies in Defendants' discovery responses and Plaintiff's threatened
5 cross-motion to compel. *Id.* After acknowledging the same day deadline for filing dispositive
6 motions, Plaintiff's counsel offered to stipulate to extend the filing deadline, not the discovery
7 cutoff. *Id.* In response to Plaintiff's email, Defendants' counsel declined to stipulate to a filing-
8 deadline extension, documenting their position regarding the alleged deficiencies in their
9 responses and expressing their concern about requesting a same-day deadline extension. *Id.*
10 Nothing in this email exchange indicated that the suggestion to extend the deadline had anything
11 to do with allowing Defendants more time to review Plaintiff's document production, as
12 Plaintiff's counsel now represents.

13 Defendants argue that Plaintiff's request to extend the discovery motion filing deadline
14 was, in fact, entirely self-motivated. Dkt. No. 55 at 4. Subsequent motions practice reinforces
15 Defendants' argument since Plaintiff was apparently forced to file an opposed motion to expand
16 the time to allow Plaintiff to pursue additional untimely third-party discovery. *See* Dkt. Nos. 39,
17 40.³

18 Which brings the Court to its most significant issue with Plaintiff's argument. Earlier in
19 the same email chain, Plaintiff's counsel notes that they do not "understand the basis for
20 [Defendants'] concern that documents are either being withheld or have been destroyed." *Id.*
21 at 70. The Court assumes this is probably because Plaintiff had not yet disclosed to his attorneys
22 the existence of the second phone containing the very documents Defendants believed were

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24 ³ The Court denied both Plaintiff's motion for relief from the discovery-motion filing deadline and motion to expand the discovery period. Dkt. No. 49 at 10-11.

1 being improperly withheld. Otherwise, counsel's later offer to expand the discovery deadline
2 could only have been intended to allow Defendants more time to review documents that would
3 preclude the need for Defendants' motion to compel if Plaintiff's counsel was already aware of
4 the additional responsive discovery that it intended to supplement at the time. So, either
5 Plaintiff's counsel was complicit in Plaintiff's discovery violations, or the request to expand the
6 discovery period was for some other reason than what Plaintiff's counsel now appears to
7 represent. Neither of these possibilities support Plaintiff's opposition to sanctions, but the Court
8 will give Plaintiff's counsel the benefit of the doubt and presume that the latter option is correct.

9 In any event, Defendants have clearly been prejudiced, and risk further prejudice, by
10 being forced to proceed on a potentially deficient factual record because of Plaintiff's discovery
11 violations. Thus, this factor strongly favors dismissal as a discovery sanction.

12 3. The Fifth Factor: Availability of Less Drastic Sanctions

13 Because the Court finds that the risk of prejudice can be remedied by imposing a less
14 severe sanction, the fifth factor precludes dismissal. The Ninth Circuit has clarified that this
15 factor includes three distinct subparts, requiring the Court to assess "whether the court has
16 considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party
17 about the possibility of case-dispositive sanctions." *Connecticut General*, 482 F.3d at 1096. This
18 is the first sanctions request that the Court has considered on this matter.⁴ As such, no alternate
19 sanction has ever been attempted, nor has Plaintiff received any specific warning regarding the
20 possibility of case-dispositive sanctions for his actions.

21 Defendants argue that dismissal is still appropriate under these circumstances because of
22 the timing and nature of the discovery violation. Dkt. 44 at 7. Defendants argue that Plaintiff's

23 ⁴ The Court refused to consider Defendants' request for sanctions included in its reply briefing on its motion to
24 compel. *See* Dkt. No. 49 at 10, n.1.

1 actions show that he cannot be trusted to proceed in good faith in this case. *Id.* at 7-8. It is true
2 that dismissal may be warranted without attempting lesser sanctions or giving explicit warnings
3 if “a party so damages the integrity of the discovery process that there can never be assurance of
4 proceeding on the true facts.” *Connecticut General*, 482 F.3d at 1097 (internal quotations
5 omitted) (citing *Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d 1051, 1058 (9th Cir.1998)). Here,
6 Defendants rely heavily on *Connecticut General*, as well as *Malone v. U.S. Postal Serv.*, 833
7 F.2d 128 (9th Cir. 1987) and *Canty*, 2018 WL 3722336, but the circumstances in this case are
8 easily distinguishable.

9 This is not a case where Plaintiff has previously refused to comply with court-issued
10 orders (*see, e.g., Malone*, 833 F.2d at 132) or has attempted to perpetrate a fraud on the Court
11 (*see, e.g., Connecticut Genal.*, 482 F.3d at 1094). Also, in two of the three example cases, the
12 court did provide an explicit warning before granting a case-dispositive sanction. *See*
13 *Connecticut General*, 482 F.3d at 1095; *see also Canty*, 2018 WL 3722336, at *5. While the
14 Court is very concerned that Plaintiff may have intentionally withheld the existence of the
15 second cell phone, he also ultimately disclosed its existence of his own volition.⁵ Plaintiff's
16 counsel then, apparently, immediately disclosed and produced responsive documents from the
17 phone to Defendants. As far as the Court is aware, Plaintiff has also fully complied with the
18 Court's prior order to compel forensic examination of his devices at his own expense. These
19 actions are far less egregious than the obstructive and deceptive acts found to warrant dismissal
20 in any of the cases upon which Defendants rely.

21 Here, the Court believes that a lesser sanction is available that could cure the specified
22 risk of prejudice to Defendants. Both the nature and timing of Plaintiff's actions may have

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24 ⁵ The Court further assumes that Plaintiff's counsel has since explained to their client his obligations as a party to this litigation and the potential consequences of his actions should he fail to meet them again in the future.

1 negatively impacted Defendants' ability to develop an adequate evidentiary record to support
2 their defenses. *Supra* § II(A)(2). Defendants highlight specific additional discovery they would
3 have pursued but for Plaintiff's belated disclosure and document production. Dkt. No. 55 at 4.
4 Defendants further acknowledge that additional time to complete this discovery could be an
5 adequate alternate sanction in lieu of dismissal. *Id.* at 3, n.2.

6 Therefore, as an alternate sanction, the Court GRANTS Defendants an additional **ninety**
7 **(90) days** to complete discovery related to any information attained from the belated
8 supplemental production and the forensic examination of Plaintiff's devices. During this
9 extended discovery period, Defendants may request additional written discovery requests, note
10 new third-party depositions, and re-note any earlier depositions, including Plaintiff's. Further, for
11 any re-noted depositions, Plaintiff shall bear the typical logistical costs (e.g., hiring an
12 appropriate court reporting service to facilitate the deposition and the fees associated with the use
13 of facilities for a deposition). Plaintiff and Plaintiff's counsel are strongly encouraged to fully
14 cooperate in good faith throughout this additional discovery period. Any further deceptive or
15 obstructive actions will result in harsher sanctions, up to and including dismissal of this action in
16 its entirety.

17 **B. Defendants' Summary Judgment Motion**

18 The potentially deficient factual record that Plaintiff's actions caused likely also
19 negatively impacted Defendants' ability to prepare an adequate dispositive motion.
20 *Supra* § II(A)(2). Plaintiff's belated supplemental document production 10 days before the end of
21 the original discovery period comprised more than four times the number of documents he had
22 produced previously. Dkt. No. 44 at 2-3. Each document produced in the supplemental
23 production existed at the time Defendants served their original discovery requests. Even if
24 Defendants had sufficient time to review the new tranche of documents and incorporate them

1 into their summary judgment motion before the dispositive motion deadline, they were deprived
2 of any opportunity to use the information to help guide and direct their discovery efforts
3 throughout the preceding discovery period. Consequently, the Court STRIKES Defendants'
4 pending summary judgment motion and resets the dispositive motion deadline to **twenty-one**
5 **(21) days after the end of the new discovery period.**

6 **III. CONCLUSION AND ORDER**

7 The Court DENIES Defendants' motion to dismiss as a discovery sanction (Dkt. No. 44)
8 but finds that a sanction is nonetheless warranted. Defendants shall have an additional **ninety**
9 **(90) days from the date of this order** to complete additional discovery related to information
10 gathered from Plaintiff's inappropriately delayed supplemental document production and the
11 previously ordered forensic investigation of Plaintiff's devices. The logistical costs for re-noting
12 any previously completed depositions shall be borne by Plaintiff.

13 The Court also STRIKES Defendants' summary judgment motion (Dkt. No. 46), but
14 Defendants shall have **twenty-one (21) days from the end of the additional discovery period**
15 to refile any dispositive motions.

16 The Court will enter an amended case schedule consistent with this Order. Consequently,
17 the Court further ORDERS the Parties to file, **within fourteen (14) days of this Order**, an
18 updated Joint Status Report (1) addressing dates on which trial counsel may have conflicts or
19 other complications to be considered in setting a new trial date;⁶ (2) including a certification that
20 all counsel and any pro se parties have reviewed Judge Lin's Chambers Procedures, the Local
21 Rules, General Orders, and the applicable Electronic Filing Procedures; and (3) including a
22 certification that all counsel and any pro se parties have reviewed and complied with Judge Lin's

23 _____
24 ⁶ For case schedules set by Judge Lin, four months is required between the deadline for the filing of dispositive motions and the trial date.

1 Standing Order Regarding 28 U.S.C. § 455 and Canon 3 of the Code of Conduct for United
2 States Judges.

3 Dated this 10th day of May 2022.

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6 Tana Lin
7 United States District Judge
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